

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUAN ACEVEDO)	
Claimant)	
VS.)	
)	Docket No. 1,055,878
PROLOGISTIX)	
Respondent)	
AND)	
)	
AMERICAN CASUALTY CO. OF READING, PA)	
Insurance Carrier)	

ORDER

Claimant and Respondent requested review of the November 19, 2012, Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on April 10, 2013.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that the February 2, 2010, work injury caused a high ankle sprain, which completely resolved within two months of the accident resulting in no permanent functional impairment. He further held the peroneal tendon injury diagnosed and treated in 2011, as well as the claimant's reported back pain, are unrelated to the February 2, 2010, accident. Respondent and its insurance carrier were found not liable for any medical treatment or temporary total disability benefits (TTD)

incurred subsequent to Dr. Bruce's treatment of the high ankle sprain in 2010. Respondent and its insurance carrier were ordered to pay all authorized medical expenses related to treatment of the claimant's February 2, 2010, injury, subject to the Kansas workers compensation schedule of medical fees. The ALJ also informed respondent and its insurance carrier that they may apply to the director for reimbursement from the workers compensation fund (Fund) for benefits paid pursuant to the July 20, 2011, preliminary order.

Claimant appeals, arguing that he has suffered permanent impairment as a result of the work-related injury and is entitled to a 15 percent whole body permanent functional impairment for the injuries to his right ankle, bilateral hips and back. Therefore, the Award should be reversed accordingly.

Respondent also appeals, seeking clarification of the dates medical and TTD benefits were paid, so that reimbursement may be sought from the Fund for those benefits paid, but unrelated to the 2010 injury. Respondent further argues that the evidence is clear that any treatment claimant received in 2011 was for a separate and distinct injury. Respondent requests that the Award be affirmed in all respects not related to clarification of said dates of payment.

FINDINGS OF FACT

Claimant worked for respondent, a temporary employment agency, and was sent to work at Ingersoll Rand. Claimant's job included packing and shipping, which involved the use of an electric pallet jack. On February 2, 2010, claimant was struck in the right ankle by a pallet jack he was running. Claimant was initially referred to William Tiemann, M.D. for treatment. Dr. Tiemann ordered x-rays and an MRI, and after reviewing the scans, diagnosed a right ankle sprain. Claimant testified that the pain in his leg and low back came after the accident. He couldn't pinpoint an exact time, but felt it was within 15-20 days of the accident.¹ Claimant was ultimately referred to board certified orthopedic surgeon, Robert P. Bruce, M.D.

Claimant first met with Dr. Bruce on March 4, 2010, for an evaluation of his right ankle pain from the February 2, 2010, accident. Claimant complained of constant medial ankle pain and some lateral ankle pain. He was unable to walk more than five minutes at a time. Claimant received some physical therapy and was given light duty restrictions. An MRI performed on February 26, 2010, displayed a probable tear of the anterior talofibular ligament near the talar attachment site and a prominent ossific fragment along the posterior and medial aspect of the sustentaculum tali.

¹ P.H. Trans. at 30.

Dr. Bruce diagnosed a right ankle sprain and instructed claimant to continue with physical therapy and to continue with his sit down work duties. On March 23, 2010, Dr. Bruce found claimant to be at maximum medical improvement and claimant was allowed to return to work with no restrictions.

Teresa Gatton, D.O., board certified in family medicine, and an urgent care physician at Freeman Health Center in Joplin, Missouri, had earlier worked for Concentra in the Kansas City area. She met with claimant and conducted a pre-employment physical for Steel & Pipe Supply Company, on October 14, 2010. Dr. Gatton reviewed the forms that claimant was asked to fill out and asked questions of claimant, based on the information provided on the forms. The questionnaire was in both English and Spanish. Dr. Gatton examined claimant and determined that claimant's ankles were normal. She did not feel that claimant was in need of any restrictions.

On claimant's physical examination form, claimant marked no to having a history of decreased function in the neck, lower back, hips, knees, legs, ankles or feet.² Claimant was cleared to work for Steel & Pipe Supply Company, full duty with no restrictions.

On March 22, 2011, claimant returned to Dr. Bruce for a repeat evaluation of his right ankle. It had been a year since claimant's last visit and he was complaining of pain in his right ankle. Claimant reported pain running down into the plantar aspect of his foot, up his posterior leg and into his right hip and lower back. Claimant also complained of a mass over his medial ankle.³ Dr. Bruce examined claimant and diagnosed right ankle pain, a right ankle mass and right leg pain. He recommended an MRI of the ankle to learn more about the mass and to help determine the cause of claimant's pain. No restrictions were given. An MRI of the right ankle was ordered.

The MRI, performed on March 25, 2011, revealed a peroneal tendon tear and subtalar joint issue. Dr. Bruce recommended the medial mass be excised and the peroneal tendon repaired. Dr. Bruce did not feel the peroneal tendon tear was related to the original injury in 2010. Claimant underwent surgery on April 29, 2011, to remove the mass and repair the tendon in claimant's right ankle.

Claimant was seen again by Dr. Bruce, on May 9, 2011, ten days after surgery, with complaints of continued pain and some cramping in his lower leg. Claimant's wound had healed well but he had mild medial and lateral swelling. Dr. Bruce recommended gentle range of motion exercises and physical therapy. He also recommended claimant remain off work.

² Gatton Depo., Ex. 1 at 2.

³ Bruce Depo., Ex. 2 at 7 (March 22, 2011 office note).

On May 31, 2011, claimant continued to complain of pain and swelling in his right ankle with pain running up his right leg and into his low back. Claimant had been taking medication for pain, but requested something stronger. He continued with his home exercise and physical therapy.

Claimant was allowed to go from a walking boot to a regular shoe and was allowed to return to driving. Claimant continued with physical therapy and was prescribed stronger pain medication. He was to perform sit down work only.

On June 9, 2011, claimant reported increased medial ankle pain beginning on June 6, 2011 and reported he was unable to bear weight on his right foot. Claimant also complained of extreme pain and heat in his ankle that ran up the entire right side of his body and into his head and of back pain. Medication provided no relief. Claimant indicated that his ankle had been doing better prior to June 6, 2011.

Dr. Bruce recommended removing fluid from claimant's ankle to check for infections and claimant was instructed to hold off on physical therapy for a day or so. Claimant could continue to perform sit down work.

On June 23, 2011, claimant continued to have pain in his ankle that radiated up his right leg when he walked. Dr. Bruce recommended three more weeks of physical therapy for additional strengthening and then opined claimant would be ready to return to full duty, with restrictions of no prolonged walking or standing.

On July 14, 2011, claimant reported that the pain and swelling in his ankle increased after therapy. He complained of pain over both sides of his ankle and had a significant limp. Claimant was found to have an antalgic gait and was unable to toe walk. Claimant was told he could return to work with restrictions of no prolonged walking or standing.

This matter went to preliminary hearing before the ALJ on July 20, 2011. In an Order of that date, the ALJ ordered respondent to provide medical treatment with Dr. Bruce as the authorized treating physician and granted claimant additional TTD beginning July 13, 2011, until claimant was released to return to work without restriction, or reached maximum medical improvement (MMI).

Dr. Bruce found claimant to be at maximum medical improvement on July 28, 2011, and claimant was returned to work with no restrictions.

Dr. Bruce wrote in a letter dated May 16, 2012, that it was his opinion, to a reasonable degree of medical certainty, that the treatment from March 22, 2011, forward was not causally related to the injury of February 2, 2010. In another letter dated July 7,

2012,⁴ he found claimant to have a 0 percent permanent partial disability of the right lower extremity at the ankle joint referable to residuals of right ankle sprain and peroneal tendon tear.

Dr. Bruce testified the February 2010 injury was not the cause of claimant's need for the April 2011 surgery. However, Dr. Bruce's written opinion of April 4, 2011, states the recommended surgery is a result of the original work injury on February 2, 2010.⁵ At some point thereafter, Dr. Bruce was provided information regarding the work activities of claimant between March 2010 and March 2011. In a letter dated July 7, 2012, Dr. Bruce modified his earlier opinion, stating that the treatment from March 22, 2011, forward was not causally related to the injury of February 2, 2010. He explained the diagnosis from the February 2, 2010, injury is right ankle sprain. The diagnosis from the return visit in March 2011, was painful talar osteophyte and peroneal tendon tear of the right ankle. He assessed claimant no impairment to the right lower extremity for the February 2, 2010, injury.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on September 27, 2011. Claimant had chief complaints of back pain; bilateral hip pain; right ankle pain and swelling; crooked right ankle; numbness of the right calf; and radiating pain from the right ankle to the back. Claimant denied any injuries to his right ankle, hip and back prior to the work-related injury he sustained on February 2, 2010.

Dr. Murati examined claimant and diagnosed low back strain secondary to antalgia; bilateral SI joint dysfunction; and status post, "Talar osteophyte excision with peroneal tendon repair, right ankle." Dr. Murati opined that claimant's back pain is the result of the limp he developed from the ankle injury.⁶ He opined that these diagnoses were, within reasonable medical probability, a direct result of the work-related injury on February 2, 2010, during claimant's employment with ProLogistix. Dr. Murati also stated claimant's ankle injury was aggravated by his subsequent employment with Kalivieg, LLC; Steel Pipe; Allied Staffing; and Buffalo Wild Wings.

Dr. Murati recommended claimant be placed in a splint, and be provided physical therapy, anti-inflammatory medication and pain medication as needed. For the SI joint dysfunction, Dr. Murati recommended cortisone injections and physical therapy with possible instruction on the use of an SI belt or gait training, and anti-inflammatory medication and pain medication as needed.

⁴ Bruce Depo., Ex. 2 at 36.

⁵ Bruce Depo. at 15.

⁶ Murati Depo. at 22.

Dr. Murati imposed temporary restrictions in an 8 hour day of no climbing ladders, squatting, lifting or carrying more than 20 pounds, occasionally pushing or pulling 20 pounds and frequently 10 pounds and claimant was to rarely stand, walk, crouch, bend, stoop, or climb stairs. Dr. Murati indicated that claimant needs a sit down job.

Dr. Murati again met with claimant on April 10, 2012, for another examination. Claimant's employer at the time of this evaluation was True Turf Lawn Care. Claimant's chief complaints included pain in right ankle radiating up to the low back; interruption of sleep at night by pain; intermittent pain in bilateral hips; swollen right ankle; numbness and tingling in the right calf and thigh; back and right leg pain after driving for more than one hour and crooked right ankle. Dr. Murati testified that claimant had not received any of the treatment he recommended when he saw him last in September 2011.

Dr. Murati diagnosed status post talar osteophyte excision with peroneal tendon repair of the right ankle; low back pain with signs and symptoms of radiculopathy secondary to antalgia; and neuropathy of the right sural, distal saphenous and peroneal nerves. He opined that all of these diagnoses were related to claimant's February 2, 2010, work injury with ProLogistix.

Dr. Murati assigned the following impairment: for loss of range of motion of the right ankle, 2 percent to the right lower extremity; for dysesthesia of the right sural nerve, 5 percent to the right lower extremity; for dysesthesia of the right distal saphenous nerve, 5 percent to the right lower extremity; for hypodysesthesia of the peroneal nerve, 3 percent to the right lower extremity. These combine for a 15 percent impairment to the right lower extremity and convert to a 6 percent whole person impairment. For the low back with signs and symptoms of radiculopathy secondary to antalgia, a 10 percent whole person impairment. The whole person impairments combine for a 15 percent whole person impairment.

Dr. Murati also imposed permanent restrictions of: no bending, crouching or stooping; no climbing ladders; no squatting; no repetitive foot controls with the right; no lifting, carrying, pushing or pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds; rarely sit, stand, walk; alternate sitting, standing and walking; and no lifting below knuckle height. These restrictions were imposed to prevent further worsening of claimant's condition.

During cross-examination, Dr. Murati originally identified claimant's ankle injury as having occurred while claimant was working at Buffalo Wild Wings, with later aggravations with other employments. Dr. Murati had no records indicating claimant was released without restrictions on March 23, 2010. Dr. Murati was also unaware that claimant had undergone a pre-employment physical in October 2010, prior to beginning work with Steel and Pipe Supply. Claimant's ankles, feet and low back were all listed as within normal limits at that time.

When Dr. Murati reviewed the x-rays from March 2010, he described them as unremarkable. The x-rays of March 2011, were noted to include an avulsed fragment at the distal fibula, which was removed with the 2011 surgery.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁸

Dr. Murati, claimant's expert, was obviously provided less than a full history of claimant's work after the original injury on February 2, 2010. He was unaware of the pre-employment physical claimant passed and of the several jobs claimant worked before returning to Dr. Bruce in March 2011, with new ankle complaints. Dr. Murati noted a distinct difference between the x-rays from 2010 and 2011. He testified that claimant's multiple employments after leaving respondent aggravated the ankle condition for which claimant had been treated in 2010 and he was unaware of the complete return to full duty with no restrictions in March 2010.

Dr. Bruce, claimant's treating physician had a complete history of claimant's work history and the treatments claimant received in 2010 and 2011. He had the opportunity to read the MRI films from both 2010 and 2011 and to compare the films.

The ALJ found the opinion of Dr. Bruce to be more credible than that of Dr. Murati. The Board agrees. This, coupled with the fact the MRI tests performed one year apart, identify different injuries, with differing results, convinces the Board that claimant had fully recovered from the 2010 accident. Additionally, after the 2010 injury claimant returned to work with no restrictions and limited medical treatment. The 2011 condition claimant was diagnosed with resulted in significant physical findings, a resulting surgery, physical therapy, permanent work restrictions and a significant permanent functional impairment. The Board finds the physical findings diagnosed and treated in 2011, are unrelated to the work accident on February 2, 2010, while claimant was employed by respondent. Respondent and its insurance carrier are not liable for any medical treatment or temporary total disability benefits incurred subsequent to Dr. Bruce's treatment of the high ankle sprain suffered on February 2, 2010.

⁷ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁸ K.S.A. 2009 Supp. 44-508(g); *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 44-534a(b) states:

(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

The ALJ rightfully held that respondent and its insurance carrier may apply to the director for reimbursement from the workers compensation fund for benefits paid pursuant to the July 20, 2011, preliminary hearing Order. The Award inaccurately reports hospital and medical expenses paid in the amount of \$7,876.41 in this matter. At the regular hearing, it was stipulated that respondent had paid \$10,636.84 in medical expenses of which \$2,760.43 were paid for the 2010 accident. The remaining \$7,876.41 in medical treatment was paid in 2011 after claimant returned to Dr. Bruce in March 2011. This money represents the medical treatment paid for the examinations and treatment in 2011, for which reimbursement should be allowed.

Additionally, TTD was paid for 8.29 weeks at the rate of \$253.35, totaling \$2,099.19, all of which was paid either pursuant to the July 20, 2011, Order or voluntarily. All TTD was paid in 2011, following claimant's return to Dr. Bruce in March of that year. None of the TTD was paid as the result of the February 2, 2010, accident. The Award of the ALJ is modified to allow respondent and its insurance company to apply to the director for reimbursement of the medical expenses totaling \$7,876.41 and TTD in the amount of \$2,099.19. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to allow respondent and its insurance company to seek authority from the director to obtain reimbursement from the workers compensation

fund for medical expenses in the amount of \$7,876.41 and TTD in the amount of \$2,099.91. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 19, 2012, is modified as noted above, but affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@bretzpilaw.com

Bart Eisfelder/Joseph R. Ebbert, Attorneys for Respondent and its Insurance Carrier
esmiley@fwpclaw.com
jebbert@fwpclaw.com

Kenneth J. Hursh, Administrative Law Judge